89-859

Supreme Court, U.S.
FILED
OCT 30 1989
JOSEPH F. SPANIOL, JR.
CLERK

NO.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

STEPHEN MEDVIK,

Petitioner,

vs.

FRANK OLLENDORFF, et al.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MISSOURI, EASTERN DISTRICT

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QUESTIONS PRESENTED FOR REVIEW

1. Is a City Work Rule Which Punishes An Unwanted or Imprudent Statement to a Co-worker of a Sexual, Racial, Ethnic or Religious Nature a Facially Unconstitutional and Overbroad Restriction on Speech In Violation of the First and Fourteenth Amendments to the United States Constitution?

2. Is a City Work Rule Which Punishes an Unwanted or Imprudent Statement to a Co-worker of a Sexual, Racial, Ethnic or Religious Nature Void for Vagueness In Violation of the Fifth and Fourteenth Amendments to the United States Constitution?

LISTING OF PARTIES

Stephen Medvik (Petitioner/Plaintiff); Frank Ollendorff, City Manager of University City, City of University City (Missouri), Civil Service Board of University City (Defendants).

TABLE OF CONTENTS AND AUTHORITIES

	Page
Opinion Below	3
Jurisdiction	3
Provisions Involved	4
Statement of the Case	5
Reasons for Granting Writ	8
Conclusion	19
Appendix	21

I. Rule 20 Is a Facially Unconstitutional and Overbroad Restriction On Speech

Riley v. National Federation of the Blind, ____ U.S.____ 101 L.Ed. 2d 669 (1988);

Board of Airport Comm'n v. Jews for Jesus, Inc., 482 U.S. 569 (1987);

Houston v. Hill, 482 U.S. 451 (1987);

Federal Election Comm'n v. Massachusetts Citizens for Life, 479 U.S. 238 (1986);

Lewis v. City of New Orleans, 415 U.S. 130 (1974);

Plummer v. City of Columbus, 414 U.S. 2 (1973);

Perry v. Sinderman, 408 U.S. 593 (1972);

Gooding v. Wilson, 405 U.S. 518 (1972);

Coates v. City of Cincinnati, 402 U.S. 611 (1971);

Pickering v. Board of Education, 391 U.S. 563 (1968);

Keyishian v. Board of Regents, 385 U.S. 589 (1967);

2. Rule 20 Is Void for Vagueness and Petitioner Was Deprived of His Property Interest In His Employment Without Due Process of Law

Maynard v. Cartwright, ____ U.S.____, 100 L.Ed. 2d 372 (1988);

Keyishian v. Board of Regents, 385 U.S. 589 (1967);

Conroy v. St. Joseph Ry., Light, Heat & Power Co., 134 S.W.2d 93 (1939).

OPINION BELOW

The opinion below is reported as Medvik v. Ollendorff, 772 S.W.2d 696 (Mo. Ct. App. 1989).

GROUNDS FOR JURISDICTION

The Missouri Court of Appeals affirmed the trial court's denial of Petitioner's Petition to Review on April 18, 1989.

The Missouri Supreme Court denied Petitioner's Application for Transfer on August 1, 1989.

Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

PROVISIONS INVOLVED

Rule 20 of the Work Rules of University City, Missouri, as promulgated in Addition to Employees Handbook, University City:

> An incident involving an unwanted or imprudent statement or action to a co-worker of a sexual, racial, ethnic or religious nature.

Amendment I to the Constitution of the United States:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment V to the Constitution of the United States:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor

> shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Section 1 of Amendment XIV to the Constitution of the United States:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner was an employee of the City of University City, a Missouri municipality. In an Addition to Employees Handbook, University City divided its work rules into four Groups. Group I lists twenty rules. An employee may be discharged for a Fourth Offense under Group 1.

Petitioner was fired for violating Rule 20: "An incident involving an unwanted or imprudent statement or action to a co-worker of a sexual, racial, ethnic or religious nature." One of the three prior offenses relied on by the City also involved an alleged violation of Rule 20. Petitioner appealed his firing, up through the Supreme Court of Missouri, without success. In the incident which led to his discharge, petitioner addressed an Afro-American co-worker as "nigger." In the prior incident, he asked an Afro-American co-worker: "Where do you get your ignorance from--your mother or your father?"

Petitioner was originally charged with violation of a work rule other than Rule 20. The Civil Service Board, after hearing, found that he had violated Rule 20. See Appendix A. Thus, petitioner had no opportunity to challenge the constitutionality of Rule 20 prior to judicial review of the administrative proceeding.

In his Petition for Review, petitioner alleged, inter allia:

The decision of defendants . . . [v]iolates plaintiff's right to due process of law under the First and Fourteenth Amendments to the United States Constitution . . . for the reason that . . . [t]he rule . . . which defendant was accused of violating, namely "[a]n incident involving an unwarranted [sic] or imprudent statement or action to a co-worker of a sexual, racial, ethnic or religious nature' . . . [is] so vague and indefinite as to give no warning to an employee of the conduct forbidden, and [is] thereby void. . . . [and] violates plaintiff's right to freedom of speech under the First and Fourteenth Amendments to the United States constitution, . . . in that . . . [t]he rule . . . which plaintiff was accused of violating . . . violate[s] plaintiff's right to freedom of speech.

See Appendix B.

The constitutional challenges raised herein were raised in the Missouri court of appeals by the following points in petitioner's brief:

RULE 20 IN GROUP I, WHICH BOTH THE BOARD AND THE CITY MANAGER FOUND THAT PLAINTIFF VIOLATED, IS "VOID FOR VAGUENESS"

GROUP I, RULE 20, UPON WHICH THE BOARD RELIED FOR SUSPENSION, AND THE CITY MANAGER RELIED FOR DISCHARGE, IS OVERBROAD AND VIOLATES THE RIGHT OF UNIVERSITY CITY EMPLOYEES TO FREEDOM OF SPEECH.

These points were denied by the Missouri court of appeals at pages 11-15. See Appendix C hereto.

REASONS WHY THE WRIT SHOULD ISSUE

1. Rule 20 Is a Facially Unconstitutional and Overbroad Restriction On Speech.

A rule which proscribes "only spoken words . . . . can . . . withstand . . . attack upon its facial constitutionality only if . . . it is not susceptible of application to speech, although vulgar or offensive, that is protected by the First and Fourteenth Amendments." Gooding v. Wilson, 405 U.S. 518, 520 (1972).

"[U]nwanted or imprudent statement[s] . . . of a sexual, racial, ethnic or religious nature" are certainly "protected by the First and Fourteenth Amendments." This Court has often held that a governmental enactment that prohibits both protected and unprotected activity is unconstitutional on its face, e.g., Lewis v. City of New Orleans, 415 U.S. 130 (1974); Plummer v. City of Columbus, 414 U.S. 2 (1973).

This applies to rules governing public employees such as Petitioner: Public employment may not be denied "to a person on a basis that infringes his constitutionally protected interests-- especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited." Perry v. Sinderman, 408 U.S. 593, 597 (1972). "While criminal sanctions and damage awards

have a somewhat different impact on the exercise of the right to freedom of speech from dismissal from employment, it is apparent that the threat of dismissal from public employment is nonetheless a potent means of inhibiting speech." Pickering v. Board of Education, 391 U.S. 563, 574 (1968).

"When a statutory provision burdens First Amendment rights, it must be justified by a compelling state interest." Federal Election Comm'n v. Massachusetts Citizens for Life, 479 U.S. 238, 256 (1986). "'Speech is often provocative and challenging . . . . But it is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest.'" Houston v. Hill, 482 U.S. 451, 461 (1987). "[W]e must be as vigilant against the modest diminution of speech as we are against its sweeping restriction. Where at all possible, government

must curtail speech only to the degree necessary to meet the particular problem at hand, and must avoid infringing on speech that does not pose the danger that has prompted regulation." Federal Election Comm'n v. Massachusetts Citizens for Life, 479 U.S. 238, 265 (1986).

Even if University City's interest in harmony and tranquilty of speech in the work place is sufficiently compelling to permit some regulation of speech, such regulation must be precisely and narrowly tailored to that purpose. "'[P]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms,' . . . '[f]or standards of permissible statutory vagueness are strict in the area of free expression. . . . Because First Amendment freedoms need breathing space to survive, govenment may regulate in the area only with narrow specificity.' . . . When one must guess what . . . utterance may lose him his position, one necessarily will 'steer far

wider of the unlawful zone. . . .' For '[t]he threat of sanctions may deter . . . almost as potently as the actual application of sanction.'" Keyishian v. Board of Regents, 385 U.S. 589, 603-604 (1967). "[M]ore benign and narrowly tailored rules are in keeping with the First Amendment directive that government not dictate the content of speech absent compelling necessity, and then, only by means precisely tailored." Riley v. National Federation of the Blind, ____ U.S.____, 101 L.Ed. 2d 669, 691-92 (1988).

Far from being narrow or specific, University City's work rule is as "overbroad" as it could possibly be, and no amount of interest in a peaceful work place could justify such a restraint on an employee's speech. See Board of Airport Comm'n v. Jews for Jesus, Inc., 482 U.S. 569 (1987); Houston v. Hill, supra; Coates v. City of Cincinnati, 402 U.S. 611 (1971).

Petitioner's use of the word "nigger" could be deemed "fighting words" (although it is doubtful that the same could be said of the venerable grade school inquiry "Where to you get your ignorance from--your mother or your father?"), and a narrow and specific work rule which would not reach protected speech could be drafted to ban such provocative terminology. But the fact that petitioner's speech could fall within a valid work rule does not affect his standing to challenge this rule, nor does it save such regulation from being stricken as facially invalid:

> "'Although a statute may be neither vague, overbroad, nor otherwise invalid as applied to the conduct charged against a particular defendant, he is permitted to raise is [sic] vagueness or unconstitutional overbreadth as applied to others. And if the law is found deficient in one of these respects, it may not be applied to him either, until and unless a satisfactory limiting construction is placed on the statute. The statute, in effect, is stricken down on its face. This result is deemed justified since the otherwise continued existence of the statute in

> unnarrowed form would tend to suppress constitutionally protected rights.'"

Gooding v. Wilson, supra at 521; accord, Levis v. City of New Orleans, supra at 133-34; Plummer v. City of Columbus, supra.

The Misouri court of appeals made a pass at a limiting construction: "Sensibly read, this language does not seek to deter harmless jokes or statements on social or political issues; rather it is properly designed to prohibit well known pejoratives unacceptable in the work place." Medvik v. Ollendorff, 772 S.W.2d 696, 701 (Mo. Ct. App. 1989). Even if a work rule forbidding the use of "well known pejoratives" would not still be "overbroad" (see Lewis v. City of New Orleans, supra at 132-33), there is simply no basis for such a reading of the rule.

The Missouri appellate court gave no clue as to how it arrived at this "construction." It certainly is not gleaned from the meanings of the words "unwanted" and "imprudent." The

constitutionality of Rule 20 "cannot 'turn upon a choice between one of several alternative meanings.'" Houston v. Hill, supra at 468. Nor can it "be limited by severing discreet unconstitutional subsections from the rest." Ibid. "The enforceable portion of this" Rule "is a general prohibition of speech that 'simply has no core' of constitutionally unprotected expression to which it might be limited." Ibid. "[T]he words of the" Rule "simply leave no room for" the "narrowing construction" which the Court of Appeals would engraft thereon. Board of Airport Comm'r v. Jews for Jesus, Inc., supra at 575. Rule 20 "plainly has a broader sweep" than "well known pejoratives." Lewis v. New Orleans, supra at 132. There is "nothing in the opinion" below "that makes any meaningful attempt to limit or properly define" "unwanted" or "imprudent," "or indeed any other term in" the Rule. Id. at 133. "[N]o readily apparent construction suggests

itself as a vehicle for rehabilitating the" Rule. Gooding v. Wilson, supra at 522.

In sum, the City "has chosen too blunt an instrument for such a delicate task" as it set out to accomplish. Federal Election Comm'n v. Massachusetts Citizens for Life, supra at 265.

2. Rule 20 Is Void for Vagueness and Petitioner Was Deprived of His Property Interest In His Employment Without Due Process of Law

> We emphasize once again that "[p]recision of rgulation must be the touchstone in an area so closely touching our most precious freedoms," . . . "[f]or standards of permissible statutory vagueness are strict in the area of free expression. . . . Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." New York's complicated and intricate scheme plainly violates that standard. When one must guess what conduct or utterance may lose him his position, one necessarily will "steer far wider of the unlawful zone. . . ." . . . For "[t]he threat of sanctions may deter . . . almost as potently as the actual application of sanctions."

Keyishian v. Board of Regents, 385 U.S. 589, 603-604 (1967).

When is a "statement of a racial nature" to a co-worker "unwanted"? Does this depend upon the mood and temperament of the addressee? Must an employee obtain his listeners' approval before telling an ethnic joke? Just as explicit obscenity statutes may themselves be "obscene" to some, an employee's attempts to discover whether a proposed conversation touching upon "race" would be offensive to a co-worker might itself be "unwanted." This portion does not give University City employees "a reasonable opportunity to know what is prohibited" because, by definition, "what is prohibited" turns upon the subjective state of mind of some person other than the actor.

Nor is the alternative "imprudent statement" any more definite. Petitioner's research has disclosed no judicial definition of the term, and Black's Law Dictionary does not include it. Webster's defines it as "not prudent; wanting in prudence or discretion; indiscreet; injudicious." WEBSTER, NEW

INTERNATIONAL DICTIONARY 2d Ed. 1950).

"Prudent" is defined

> as "characterized by, arising from, or manifesting prudence; . . . capable of directing or conducting oneself wisely and judiciously; morally or intellectually disciplined; cautious, circumspect, or discreet, as in conduct, choice of ends, or business management; not rash or ill advised; highly sensible; often frugal; provident."

Conroy v. St. Joseph Ry., Light, Heat & Power Co., 134 S.W.2d 93, 95 (Mo. 1939). It would appear that the only "prudent" way to avoid being "indiscreet" where topics "of a sexual, racial, ethnic or religous nature" are concerned is to limit your conversation to "yea" or "nay." The term "imprudent statement" certainly does not provide the "explicit standards" required by due process.

Perhaps a trained jurist is "capable of determining whether a racial remark is 'unwanted' or 'imprudent,'" but the rule must be understood by a mechanic with a grade school education. Even if it be presumed that

petitioner should have known that his racial appellation would be "unwanted" where his Afro-American auditor was concerned, this does not affect his right to challenge the vagueness of the rule. Rule 20 applies to "speech only." Although this Court has tested statutes for vagueness by the "as applied" litmus where conduct is concerned, this standard is not used to test "speech only" restrictions. "Vagueness challenges to statutes not threatening First Amendment interests are examined in light of the facts of the case at hand; the statute is judged on an as-applied basis." Maynard v. Cartwright, ____ U.S.____, 100 L.Ed. 2d 372, 380 (1988) (Emphasis added.).

This "work rule" is incontestably vaque.

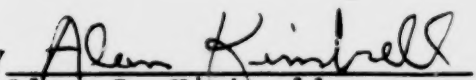
CONCLUSION

The writ should be granted because the rule which petitioner was fired for violating, and the decision below, are contrary every decision this Court has handed down in the last

quarter of a century regarding freedom of speech.

Respectfully submitted,

ROSECAN, KIMBRELL & MYERS

By 

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A P P E N D I X

City of University City
6801 Delmar Boulevard
University City, MO 63130
(314) 862-6767
March 21, 1985

Mr. Stephen Medvik
Central Garage

This is an official notification that your employment will be terminated from the City of University City at the end of the work day on March 22, 1985, for the abusive language you directed at Thirplis Williams on March 15, 1985.

You received a letter dated June 17, 1983, from Mr. Michael McPhail indicating that you were being disciplined for making offensive remarks to Mr. Richard Kemp. You were told, "Should any further incidents occur, your employment status will be reviewed and discharge may result."

Attached is your final payroll check and form for the refund of your pension contributions.

Appendix A

Please fill out the attached form in order to receive your pension contributions. You will receive your contributions in a few weeks, provided that the uniforms and other materials that belong to the City are returned. Any damaged or non-returned items will be deducted from your pension check.

I am providing you an opportunity to make any statements or repeat your story to me at this time. Thank you.

Sincerely,

Willie Norfleet
Director of Finance

WN:jh
enc.

In the matter Medvik vs. The City of University City the following shall be included in the minutes of the Proceedings and shall constitute the recommendation of the Civil Service Board:

With regard to the hearing we just had on Steve Medvik's discharge, after deliberating the Board determined that the discharge was probably an inappropriate and more severe disciplinary action than was warranted and recommends that the employee be suspended for two months, beginning March 22, 1985, the last date on which the employee was employed. The Board's deliveration included the following considerations: The Board did not believe that the incident resulting in the discharge amounted to a Group II, Rule XIII, Racial Harrassment, because in the Board's view harrassment is something that would involve repetitious action rather than a single incident; and the Board was of the belief that

the incident involved was probably more properly categorized as a Group I, Rule XX, violation of Abusive Language of a Racial Nature. In any event, the Board did believe that the problem was a serious problem; that the language used was definitely inappropriate; and that because of the employee's prior disciplinary problems over the last six or seven years the employee should be given a substantial disciplinary action, such as a two-month suspension. One of the mitigating factors which the Board considered was the provocation involved prior to the employee's action; the fact that the employee had been accused of coming in late from lunch on Saturdays, a day on which there was a lack of supervision in the shop, etc. The Board also felt that if the employee was creating other problems in the workplace the City should have presented more evidence with regard to those specific problems, and particularly of a more

recent nature; and in that regard the Board would have liked to hear some testimony from other employees who worked with Mr. Medvik and from Mr. Medvik's supervisor.

A motion to approve the above statement by the Chairman was made by Mr. Richard Reynolds, seconded by Mr. John Clancy and carried unanimously.

/s/
Henry F. Luepke, Jr.
Chairman, Civil Service Board

Date of signature 4/5/85

before and the Friday whey he said it directly.

MR. PINES: But no one else has ever made any complaint to the city, as far as you know, about the use of that term by Mr. Medvik?

MR. NORFLEET: I've only been here two months.

MR. PINES: Okay. There is nothing else on file?

MR. NORFLEET: No.

MR. PINES: Now, as I understand it, you base your discharge on the items that are contained under group two. I'm reading this directly. It says "racial harassment of company workers."

MR. NORFLEET: That's correct.

MR. PINES: Let me direct your attention to item number four that reads, does it not, "an incident involving an unwarranted or imprudent statement to a co-worker of sexual, ethnic, racial or religious nature"? Isn't that what that says, sir?

MR. NORFLEET: Yes.

MR. PINES: And that's under a less serious group of offenses for which there are various lesser limits of reprimand; isn't that true?

MR. NORFLEET: Yes.

MR. PINES: Yet you determined to discharge

IN THE CIRCUIT COURT OF THE COUNTY OF ST. LOUIS
STATE OF MISSOURI

STEPHEN MEDVIK,	)	
	)	
Plaintiff,	)	Cause No. 524807
	)	
vs.	)	
	)	
FRANK OLLENDORFF, City Manager of University City,	)	Division No. 5
	)	
Serve at: 6801 Delmar University City, MO 63130,	)	
	)	
and	)	
	)	
CIVIL SERVICE BOARD OF UNIVERSITY CITY,	)	
	)	
Serve at: 6801 Delmar University City, MO 63130,	)	
	)	
Defendants.	)	

PETITION FOR REVIEW

Comes now plaintiff and petitions this Court, under the provisions of RSMo § 536.100 et seq., for a review of the administrative decision by defendants terminating his employment, on the grounds that:

1. Plaintiff is a resident of St. Louis County, Missouri.

2. Defendant University City is a municipal corporation organized and existing under the laws of the State of Missouri; Frank Ollendorff is the City Manager thereof.

3. On March 22, 1985, plaintiff was employed as a mechanic by University City.

4. On that date, plaintiff was discharged from his employment by the Director of Finance of University City.

5. On April 1, 1985, in accordance with the Civil Service Rules of University City, plaintiff appealed his discharge to the Civil Service Board of that city.

6. On April 5, 1985, plaintiff's appeal was heard by the Civil Service Board.

7. On said date, that board found that plaintiff had committed "a Group 1, Rule XX, violation of Abusive Language of a Racial Nature," and recommended that he receive a two-month suspension.

8. On April 9, 1985, defendant Ollendorff rejected the findings of the Civil Service Board, found that plaintiff was guilty of a Group II violation of "racial harassment of a co-worker," and permanently terminated his employment.

9. Individually and collectively, defendants constitute an "agency," and plaintiff's appeal was a "contested case," under the provisions of RSMo §536.010.

10. Plaintiff has exhausted his administrative remedies.

11. This Court has jurisdiction of this Petition for Review by reason of RSMo §§ 536.010.

12. The decision of defendants should be set aside, and plaintiff should be reinstated as an employee, because that decision:

a. Violates plaintiff's right to due process of law under the First and Fourteenth Amendments to the United States Constitution,

and Article 1, § 10 of the Missouri Constitution, for the reason that:

(i) Defendant Ollendorff, in rejecting the findings of the Civil Service Board, considered matters which were outside of the record of the hearing before that Board, not included in the termination letter of the Director of Finance, and not included in any "Complaint" presented to plaintiff before his hearing; plaintiff was given no notification that these matters would be considered, and no opportunity to present evidence or defend himself with regard thereto.

(ii) Rule XIII.2 of the Civil Service Rules, which grants to the City Manager the unbridled discretion to reject the findings and recommendations of the Civil Service Board, without hearing any of the evidence which was heard by that Board, and without giving the employee any right to present evidence or arguments in support of the findings and

recommendations of that Board, violates and makes a sham of the right to a "hearing" before the Board, and denies the employee any due process with regard to the ultimate decision.

(iii) The rules which plaintiff was accused of violating, namely "[a]n incident involving an unwarranted or imprudent statement or action to a co-worker of a sexual, racial, ethnic or religious nature" and "[s]exual, racial, ethnic or religious harassment of a co-worker" are so vague and indefiite as to give no warning to an employee of the conduct forbidden, and are thereby void.

b. Violates plaintiff's right to freedom of speech under the First and Fourteenth Amendments to the United States Constitution, and Article 1, § 8 of the Missouri Constitution, in that:

(i) The rules which plaintiff was accused of violating, set forth in

sub-paragraph (a)(iii) above, violate plaintiff's right to freedom of speech;

(ii) Firing plaintiff for using the specific language he was accused of using violates plaintiff's right to freedom of speech.

c. Violates RSMo § 536.080.2, in that the city Manager considered matters not placed in evidence in the hearing held by the Civil Service Board.

d. Violates RSMo § 536.080.1, in that plaintiff had no opportunity to present oral arguments or written briefs to the City Manager.

e. Violates Rule XIII.2 of the Civil Service Rules of the City of University City, Missouri, in that no complaint was ever served on plaintiff or filed in the Office of the City Clerk.

f. Is unsupported by competent and substantial evidence upon the whole record.

g. Is made upon unlawful procedure and without a fair trial in that the body which held the hearing (the Civil Service Board) had no authority to decide the case, and the agency who decided the case (the City Manager) did not participate in the hearing.

h. Is arbitrary, capricious and unreasonable.

i. Involves an abuse of discretion.

WHEREFORE, plaintiff prays that the decision terminating his employment be reversed, and that defendants be ordered to reinstate him with full pay from the date of his termination to his reinstatement.

ROSECAN AND KIMBRELL

By /s/
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POINTS RELIED ON

I

PLAINTIFF'S DISCHARGE VIOLATED HIS RIGHT TO DUE PROCESS OF LAW.

A. THE CITY MANGER CONSIDERED MATTERS AS TO WHICH PLAINTIFF HAD NO NOTICE.

B. PLAINTIFF WAS DENIED THE RIGHT TO CONFRONT AND CROSS-EXAMINE THE WITNESSES AGAINST HIM.

C. PLAINTIFF WAS DENIED THE RIGHT TO REBUT TESTIMONY BY PRESENTING WITNESSES IN HIS OWN BEHALF.

Tonkin v. Jackson County Merit System Comm'n, S.W. 2d 25 (W.D. Mo. 1980);

Mueller v. Ruddy, 617 S.W.2d 466 (E. D. Mo. 1981);

Douglas v. Alabama, 380 U.S. 415 293 (1963);

Townsend v. Sain, 372 U.S. 293 (1963);

Mattox v. United States, 156 U.S. 237 (1895);

White v. Finkebeines, 570 F.2d 194 (7th Cir. 1978);

Hill v. Nelson, 466 F.2d 1346 (9th Cir. 1972);

United States ex rel. Choice v. Brierley, 460 F.2d 68 (3d Cir. 1972);

Stotts v. Perini,427 F.2d 1296 (6th Cir. 1970).

II

RULE 20 IN GROUP I, WHICH BOTH THE BOARD AND THE CITY MANAGER FOUND THAT PLAINTIFF VIOLATED, IS "VOID FOR VAGUENESS"

Ferguson Police Officers Ass'n v. City of Ferguson, 670 S.W.2d 921 (E.D. Mo. 1984);

State of Brown, 660 S.W.2d 694 (Mo. 1983) (En Banc);

Conroy v. St. Joseph Ry., Light, Heat & Power Co., 134 S.W.2d 93 (Mo. 1939);

WEBSTER, NEW INTERNATIONAL DICTIONARY (2d Ed. 1950).

III

GROUP I, RULE 20, UPON WHICH THE BOARD RELIED FOR SUSPENSION, AND THE CITY MANAGER RELIED FOR DISCHARGE, IS OVERBROAD AND VIOLATES

THE RIGHT OF UNIVERSITY CITY EMPLOYEES TO FREEDOM OF SPEECH

Perry v. Sinderman, 408 U.S. 593 (1972);

McNea v. Garey, 434 F. Supp. 95 (N.D. Ohio 1976);

Gasparinetti v. Kerr, 568 F.2d 311 (3d Cir. 1977);

State v. Swoboda, 658 S.W.2d 24 (Mo. 1983) (En Banc);

Coates v. City of Cincinnati, 402 U.S. 611 (1971);

MO. REV. STAT. § 574.101(1)(b).

IV

FIRING PLAINTIFF FOR ADDRESSING A CO-WORKER AS "NIGGER" VIOLATES THE FIRST AMENDMENT BECAUSE THE CITY MADE NO SHOWING THAT PLAINTIFF'S ABILITY TO PERFORM HIS JOB WAS IMPAIRED THEREBY OR THAT THE EFFICIENT OPERATION OF THE CITY'S GOVERNMENT WAS INTERFERRED WITH.

Tygreet v. Barry, 627 F.2d 1279 (D.C. Cir.

1980);

Waters v. Chaffin, 684 F.2d 833 (11th Cir. 1982);

Williams v. Trimble, 527 F. Supp. 910 (S.D.N.Y. 1981).

V

THE CITY MANAGER'S DECISION IS NOT SUPPORTED BY COMPETENT OR SUBSTANTIAL EVIDENCE IN THAT THERE WAS NO COMPETENT EVIDENCE THAT PLAINTIFF WAS GUILTY OF THREE PRIOR GROUP I OFFENSES.

IN THE SUPREME COURT OF MISSOURI

No. 71744

E.D. No. 54792

May Session, 1989

Stephen Medvik,

Plaintiff-Appellant,

vs. TRANSFER

Frank Ollendorff,

Defendant-Respondent.

Now at this day, on consideration of Plaintiff-Appellant's application to transfer the above entitled cause from the Eastern District Court of Appeals, it is ordered that said application be, and the same is hereby denied.

STATE OF MISSOURI-Sct.

I, THOMAS F. SIMON, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the May Session thereof, 1989, and on the 1st day of August, 1989, in the above entitled cause.

Given under my hand and seal of said Court, at the City of Jefferson, this 1st day of August, 1989.

/s/Thomas Simon Clerk

_____ D.C.

IN THE MISSOURI COURT OF APPEALS

EASTERN DISTRICT

Division Four

STEPHEN MEDVIK,	)	No. 54792
	)	
Plaintiff/Appellant,	)	Appeal from the Circuit Court of
vs.	)	St. Louis County
	)	
FRANK OLLENDORFF,	)	Hon. Arthur Litz
	)	
Defendant/Respondent.	)	Opinion Filed: April 18, 1989

This appeal is before us for the second time. See Medvik v. Ollendorff, 727 S.W.2d 473 (Mo. App. 1987). Plaintiff, Stephen Medvik (Medvik), was discharged from employment as a mechanic for University City, Missouri (City). He was notified of his termination in a letter from Willie Norfleet (Norfleet), the City's Director of Finance. Procedures established by the City allow an employee to appeal a disciplinary action to the City's Civil Service Board (Board). The Board holds a hearing and makes a recommendation to the City Manager.

The City Manager provides the last review at the administrative level.

Medvik appealed his discharge to the Board, the Board recommended a suspension rather than a discharge, the City Manager, Frank Ollendorff (Ollendorff), sustained the discharge, and, on review, the circuit court reversed the discharge and ordered Medvik reinstated. On appeal, we reversed and remanded this cause to the circuit court, directing the court to remand this cause to Ollendorff for him to make Findings of Fact and Conclusions of Law, after reviewing the record and hearing oral argument or receiving written briefs. Medvik v. Ollendorff, supra, 727 S.W.2d at 472; §§ 536.080(1)-(2), 536.090 RSMo (Supp. 1987).

Apparently, the trial court remanded the cause to the Board, which made an identical findings and recommendation. Ollendorff, after following the process dictated by our prior

opinion, again concluded Medvik's discharge should be sustained. The circuit court affirmed. We affirm the judgment of the trial court.

Medvik first contends his right to procedural due process was violated in the termination process. More specifically, he contends he was not given proper notice, he was denied his right to confront and cross-examine the witnesses used against him and he was denied the right to present witnesses in his own behalf. We disagree.

The City publishes an "Employees Handbook" which, among other things, sets out work rules, the recommended "Uniform Disciplinary Penalties . . . for the Enforcement of General Work Rules" and the appeal "Procedure for Handling Complaints Relating to Discharge." The parties tacitly agree that this Handbook, by requiring cause for discipline and by establishing an appeal procedure, creates a property interest

in continuing employment. See Perry v. Sindermann, 408 U.S. 593, 92 S. Ct. 2694, 33 L. Ed.2d 570 (1972). Medvik may not be deprived of this interest without appropriate procedural safeguards. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 541, 105 S. Ct. 1487, 1493, 84 L. Ed.2d 494, 503 (1985); Belton v. Board of Police Comm'rs of Kansas City, 708 S.W.2d 131, [6] (Mo. banc 1986). The Due Process Clause applies, but what process was due?

The City's "Employees Handbook" separates employee actions which constitute offenses into separate Groups and recommends punishment for the first and subsequent offenses in each Group. Apparently, there are four Groups of offenses. The higher the Group number, the more egregious the included offenses. Part of the dispute in this case involved a determination of whether Medvik's actions constituted a Group I or Group II offense. Discharge is recommended for a fourth Group I offense, but it is recommended after only two Group II offenses.[1]

---

[1]GROUP I

The suggested discipline or discharge is

_____

First Offense - Warning followed by appropriate instruction

Second Offense - One or two-day suspension, without pay

Third Offense - Five-day suspension, without pay

Fourth Offense - Discharge

Note: Consideration may be given to the severity of the offense, the cost involved, the time interval between offenses, the length and quality of service record, and the ability of the employee concerned. In each case where the penalty deviates from the recommended standard penalties, the reasons for such deviation will be noted.

1. . . . .

. . . .

20. An incident involving an unwanted or imprudent statement to a co-worker of a sexual, racial ethnic or religious nature.

GROUP II

First Offense - Two-day suspension without pay followed by appropriate instruction

1. . . . .

. . . .

13. Sexual, racial, ethnic or religious

determined not only by the nature of the current offense and, thus, its classification, but also by the nature of any prior offenses and, thus, their respective classifications and the frequency of those offenses. In sustaining Medvik's discharge, Ollendorff found that Medvik had committed four Group I violations - a current Group I violation and three prior ones. Medvik contends he did not receive proper notice of these charges. We read the record differently.

Medvik's counsel on appeal was not his counsel at the hearing before the Board. Medvik's appellate counsel must take the record as he finds it, and so must we.

In his letter of discharge to Medvik, Norfleet informed Medvik that the letter was "official notification" that Medvik's "employment [would be] terminated . . . at the end" of the next working day. The letter also

---

harassment of a co-worker.

said Medvik's discharge resulted from an incident on March 15, 1985, involving "abusive language" directed to a fellow employee, Thirplis Williams, who is black. Several times during this incident, Medvik used the word "nigger," a derogatory, bigoted epithet. This language could be a Group I, Rule 13 offense - "an incident involving an unwanted or imprudent statement to a co-worker of a . . . racial . . . nature," or it could be Group II, Rule 20 offense - ". . . racial . . . harassment of a co-worker."

Norfleet's letter also reminded Medvik of a 1983 incident in which he was "disciplined for making offensive remarks to Mr. Richard Kemp" and in which, Norfleet reminded Medvik, he was told: "Should any further incidents

occur, your employment status will be reviewed and discharge may result."[2]

At the hearing before the Board, Medvik was represented by counsel. His personnel file was read into the record, without objection. It disclosed the four incidents requiring discipline referred to in Ollendorff's findings - the then current 1985 incident and incidents in 1983, 1981 and 1980. Investigative reports of the City's Affirmative Action Committee concerning possible racial overtones in at least two of these incidents were also read into the record, without objection. Moreover, Medvik's counsel questioned the City's Affirmative Action Officer as well as Norfleet. Based upon this record, the Board, in its

[2]Medvik was also informed he had "an opportunity to make any statements or repeat [his] story to [Norfleet] at this time. . . ." Norfleet's report of this incident incidates he spoke with Medvik while investigating it. Medvik does not specifically contend that he was not given proper pre-termination notice. See, e.g., Belton v. Board of Police Comm'rs of Kansas City, supra, 708 S.W.2d at 838.

Findings of Fact, said it "did not believe the [1985] incident resulting in the discharge amounted to a Group II, Rule XIII, Racial Harrassment (sic) . . . ."; rather, the Board characterized Medvik's conduct as "abusive Languge of a Racial Nature," a Group I violation. Ollendorff also found the 1985 incident to be a Group I violation, and he found three prior incidents in 1983, 1981 and 1980, for which Medvik had been disciplined, were Group I violations.

Medvik contends Norfleet's letter did not notify him he was being charged with the four Group I violations upon which Ollendorff sustained Medvik's discharge. The letter, Medvik argues, notified him of only two violations - the then current 1985 incident and a 1983 incident, neither of which was classified by Group. Moreover, Medvik argues, the hearing before the Board did not cure the error of improper notice; rather, he argues

the hearing before the Board compounded the error because during the hearing Norfleet characterized the 1985 incident as a Group II violation, not a Group I.

Medvik's view of Norfleet's letter is too narrow. The notice given by that letter in this administrative proceeding need not meet the precision required by a criminal or, even, a civil judicial proceeding. See, e.g. State ex rel. Powell v. City of Maplewood, 610 S.W.2d 375, 376 [1] (Mo. App. 1980). Medvik simply needed to be fairly apprised of the grounds upon which his discharge was sought. Id. Norfleet's letter not only specifically pointed out the 1985 and 1983 incidents but also specifically reminded Medvik of the warning given him at the time of the 1983 violation - "Should any further incidents occur, your employment status will be reviewed and discharge may result" (emphasis added). Sensibly read, this is warning enough that

Medvik's entire employment would be reviewed. Medvik was no neophyte naively lost in a procedural maze; nor does the record indicate the counsel Medvik retained was a new boy on the block. More important, perhaps, at the hearing before the Board, Medvik's counsel made no objection to or inquiry about Medvik's prior violations and the accompanying disciplinary actions which were read into the record by Norfleet.

Admittedly, when asked whether he was basing Medvik's discharge on a Group II offense, Norfleet answered: "That's

correct."[3] But, Norfleet also said he was not basing his "judgment on one incident." He was "basing it on the continuation of several incidients and several problems consistently with . . . Medvik." He went on:

> "It's just that this last incident demanded action and I took action. And it's not a hasty move on my behalf. It's after careful consideration of the employee, looking at the history, I feel that it's in the best interest of the City to terminate that employee."

---

[3]The precise colloquy was:

[Board Member]:	I'm looking at the Employee's Handbook. Are you basing the discharge on his Group II offense? Is that correct?
Norfleet:	That's correct.
[Board Member]:	Now, my question there is on the first offense in Group II this calls for a two day suspension without pay. The attempt (sic) would have been the incident with Mr. Kemp back in June of (1983) but I don't believe that action was taken then. He was demoted.
Norfleet:	That's correct.

Learning this, Medvik's counsel could not help from knowing it was Medvik's prior violations, precisely laid out before the Board, which were the grounds for his discharge. This was adequate notice to Medvik.

If not adequate notice, then, the unquestioning acceptance by Medvik's counsel of the City's proof of Medvik's prior violations constitutes a waiver of that notice. Admittedly, a waiver is the intentional relinquishment of a known right. E.g. Shapiro v. Shapiro, 701 S.W.2d 205, 206 [2] (Mo. App. 1985). And, that intent is never lightly inferred, see, Dunn v. Pickard, 284 S.W.2d 6, 9 [2] (Mo. App. 1955), particularly, when, as here, the right in issue is a constitutional right. See, e.g., Klein v. Harris, 667 F.2d 274, 288 [19] (2d Cir. 1981). But, this reluctance to find a waiver stems from the basic reason for the existence of the right to notice: simple fairness. We have carefully

read the record here. On the present facts, Medvik was fairly notified of the charges against him.

Medvik also contends he was denied the right to confront and cross-examine the witnesses against him. More specifically, he argues "the City did not call a single witness who had personal knowledge" of the charges on which Ollenforff relied, and he argues there is no indication the Board had subpoena power which he could invoke to call witnesses.

We do not operate in a vacuum. We, obviously, must limit our review to the record before us. Medvik's counsel made no objection to any of the evidence adduced. This evidence is, therefore, competent, see, e.g., Mark Twain Homes v. Labor and Indust. Rel. Comm'n., 616 S.W.2d 145, 147 [1, 2] (Mo. App. 1981), and, from our review, we find it sufficient to support Ollendorff's findings. Id. We have read the cases Medvik cites to attach the

weight given to hearsay evidence. They are distinguishable.

Moreover, we are not persuaded by Medvik's complaint about the Board's possible lack of subpoena power. Medvik never requested the Board to aid him in producing witnesses and, thus, never demonstrated to the Board, to Ollendorff or to us the prejudice worked against Medvik because these unnamed witnesses did not appear.

Medvik also complains that Ollendorff made his own findings without hearing evidence and without an opportunity to evaluate the credibility of witnesses. This procedure, Medvik argues, made the hearing before the Board a nullity and denied him the right to rebut testimony by presenting witnesses in his own behalf before Ollendorff.

Ollendorff was the final decision maker. He based his decision on his reading the transcript of the proceedings before the Board

and on his review of the Board's findings and recommendations. Moreover, Medvik was given an opportunity to file a written brief or make an oral argument before Ollendorff. This procedure is neither unusual or contrary to approved administrative proceedings. §536.080.2 RSMo 1986; see e.g. Ferrario v. Bear, 745 S.W.2d 193, 197-198 [6] (Mo. App. 1987); Bell v. Gen'l Motors Assembly Div., 742 S.W.2d 225, 226 [3] (Mo. App. 1987). Medvik's real complaint is that Ollenforff classified Medvik's violations. Those violations were uncontested and, thus, Ollenforff's classification of them as being within the offenses defined by Group I - the least egregious of the classified offenses - worked no prejudice against Medvik.

The procedural process due in an administrative hearing is less than that required by a full trial. Boyd v. Civil Service Comm'r of City of St. Louis, 657 S.W.2d

83, 96 [4] (Mo. App. 1983). Within proper administrative limits, Medvik was entitled to notice of the charges against him, presentation of the evidence against him and an opportunity to present his side of the story. E.g., Belton v. Board of Police Comm'rs, supra, 708 S.W.2d at 137. The specific dictates of this due process are determined by balancing Medvik's property interest, the risk of erroneously depriving him of that interest through the procedure used, and the City's interest in quickly removing an unsatisfactory employee. Id. Medvik was given the process required by

this balance. We find no need to judicialize this process more.[4]

Medvik also contends his right to due process was violated because the conduct prohibited by Group I, Rule 20, one of the grounds of his discharge, is too vaguely defined and, therefore, does not pass constitutional muster. We disagree.

> [A] statute which either forbids or requires [conduct] in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application

[4]In a separate point, Medvik makes an additional attack on Ollendorff's Findings. If not repetitious, this argument is interrelated with Medvik's prior attack on Ollendorff's Findings. Medvik contends Ollendorff's "decision is not supported by competent or substantial evidence [because there] was not competent evidence that [Medvik] was guilty of three prior Group I offenses." We have disposed of this contention. Additionally, we note that an administrative body's decision is presumptively valid, and we do not interfere with the administrative discretion exercised in reaching that decision, see, e.g., St. Louis County Police Officers Union v. Gregory, 622 S.W.2d 712 (Mo. App. 1981); nor do we substitute our judgment for that of the administrative body. See, e.g., Heitzler v. Eppenberger, 596 S.W.2d 458 (Mo. App. 1980).

> violates the first essential of due process of law . . . .
>
> Ferguson Police Officers Ass'n. v. City of Ferguson, 670 S.W.2d 921, 927 (Mo. App. 1984).

This "void for vagueness doctrine" is applicable to civil as well as criminal cases. Id. The doctrine serves two purposes. It ensures that the person of ordinary itelligence is given a reasonable opportunity to know what is prohibited, so that he may act accordingly. It also protects against arbitrary and discriminatory enforcement by ensuring that laws provide explicit standards for those who apply them. State ex rel. Cook v. Saynes, 713 S.W.2d 258, 260 (Mo. banc 1986).

Rule 20 authorized sanctions against Medvik for "an unwanted or imprudent statement . . . to a co-worker of a sexual, racial, ethnic or religious nature." Medvik contends these words do not give him "reasonable opportunity to know what it prohibited." For example, he argues, one can imagine a joke or

comment touching on race or gender that would be offensive only to a sensitive hearer. Contrary to the speaker's expectations, he contends, such a statement could be deemed "unwanted" or "imprudent" and, thus, a Rule 20 violation. Therefore, he concludes, the rule is "so vague that its enforcement cannot help but result in arbitrary and capricious restrictions upon employees' freedom of speech." We disagree.

Medvik's argument is misdirected and forced. We are not required to determine whether the Rule could conceivably be enforced in a discriminatory manner. It will pass constitutional muster if it is susceptible to a reasonable construction supporting its constitutionality. Bell v. Board of Education of City of St. Louis, 711 S.W.2d 950, 953 (Mo. App. 1986).

Admittedly, the vagueness doctrine may require greater precision in drafting

regulations affecting free speech than those affecting other conduct. Ferguson Police, supra at 927. A rule designed to prevent inflammatory and disruptive statements, however, necessarily involves some inherent uncertainty. Other than a litany of selected terms, an alternate definition that provides a bright line between permissible and impermissible speech in the work place is not readily apparent. It is necessary that a person subject to the rule be able to make some judgment whether his statement is prohibited. Ferguson Police, supra at 927. At this stage of civilized history, persons of normal intelligence are capable of determining whether a racial remark is "unwanted" or "imprudent." We do not believe the guarantee of due process requires the City to define these terms with "mathematical precision." Saynes, supra at 261. Rule 20 is not void for vagueness.

Medvik makes a similar argument in asserting Rule 20 is impermissibly overbroad. Under the Rule, he contends, "a University City employee may be fired for upholding Professor Shockley's views, in the presence of a black co-worker, that whites have higher IQ's, or for denying the divinity of Christ in the hearing of a Christian co-workers." Because Rule 20 prohibits constitutionally protected speech, plaintiff contends, it is facially invalid. Again, we disagree.

The overbreadth doctrine does not require invalidation of the prohibition unless it is "substantially overbroad" and not fairly susceptible to a construction that would limit its applicability to a constitutionally permissible scope. Airport Commissioners v. Jews for Jesus, Inc., ____ U.S. ____, 107 S.Ct. 2568, 2573 (1987). We need not and do not construe Rule 20 as broadly as does Medvik. See Christian v. City of Kansas City, 710

S.W.2d 11, 14 (Mo. App. 1986); State v. Swoboda. 658 S.W.2d 24, 25 (Mo. banc 1983). As an employer, the government has an interest in maintaining an orderly work place, which may include removal of disruptive employees who tend to impair efficiency. See Connick v. Myers, 461 U.S. 138, 150-51, 103 S.Ct. 1684, 1693 (1983). To serve this interest, Rule 20 prohibits statements "to a co-worker" of a racial nature that are "unwanted or imprudent." Sensibly read, this language does not seek to deter harmless jokes or statements on social or political issues; rather, it is properly designed to prohibit well known pejoratives unacceptable in the work place.

Given this sensible construction, we conclude, Rule 20 is not "substantially overbroad." See Broadrick v. Oklahoma, 413 U.S. 601, 615, 93 S.Ct. 2908, 2918 (1973); Gooding v. Wilson, 405 U.S. 518, 523, 92 S.Ct. 1103, 1106-07 (1972). Conceivably, it may be

susceptible to an improper application. It is unnecessary, however, to find it facially invalid because an employee's arguably protected speech may be reached or chilled by the rule. Broadrick, supra at 618, 93 S.Ct. at 2919. The Rule was designed to deter the kind of statements made by Medvik. This Court has said:

> Where there are a substantial number of situations to which the statute or regulation might validly apply, we will not strike down the provisions for overbreadth. . . . If the rights of persons on the edge of the regulation's applicability will be infringed, it will be for them to make the challenge in a concrete dispute.
>
> Ferguson Police, supra at 929.

Medvik cites State v. Swoboda, 658 S.W.2d 24 (Mo. banc 1983), which struck down a state peace disturbance statute as overbroad. Swoboda is not controlling here.

Criminal statutes, as in Swoboda, must be scrutinized for overbreadth with particular care. E.g., City of Houston v. Hill, 482 U.S.

451, ____, 107 S.Ct. 2502, 2508 (1987). Rule 20, in issue here, is not a criminal statute applied to a member of the general public. It is an administrative regulation applicable only to municipal employees for comments made to co-workers in the work place. Implicit in our prior decisions is the unarticulated principle that, as an employer, a government entity may regulate speech among its employees under rules that may be overbroad if applied to the public in general. See, e.g., Fitzgerald v. Nations, 610 S.W.2d 48 (Mo. App. 1980), cert. denied, 452 U.S. 906, 101 S.Ct. 3032, 69 L.Ed. 2d 407 (1981).

Medvik also contends his First Amendment rights were violated because the City failed to show his calling a co-worker "nigger" impaired Medvik's ability to perform or interfered with the efficiency of the work place.

> To determine whether a public employer has properly discharged an employee for engaging in speech requires "a balance between the

> interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the state, as an employer, in promoting the efficiency of the public services it performs through its employees."
>
> Rankin v. McPherson, 483 U.S. 378, 107 S.Ct. 2891, 2897 (1987), quoting Pickering v. Board of Education, 391 U.S. 563, 568, 88 S.Ct. 1731, 1734-35 (1968).

The Pickering balance need not be applied where the employee's statement does not deal with a matter of public concern. See Rankin, supra 483 U.S. at ____, 107 S.Ct. at 2896-97. Quite simply, the use of a racial epithet in addressing a co-worker does not constitute a comment on a matter of public concern. If the employee's speech does not involve a matter of public concern, "government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment." Connick v. Myers, supra, 461, 103 S.Ct. at 1690 (1983).

Even where the balancing test applies, however, the government employer's interest in regulating the speech is greater when the statement may be presumed to have impeded the employee's performance or interfered with the regular operation of the work place. See Pickering, supra, 391 U.S. at 572-73, 88 S.Ct. at 1737. We can hardly imagine a statement more likely to disrupt the work place than the use of the uniquely ugly and inflammatory epithet employed repeatedly by Medvik. The City was not obliged to make a special showing to demonstrate the disruptive impact of these remarks. This court has held that the First Amendment does not protect a public employee from the consequences, including discharge, of making a "vitriolic personal attack" on another in the work place. Fitzgerald, supra at 50. Nor does the First Amendment shield Medvik, a municipal employee, from sanctions for racial slurs directed to fellow employees.

Judgment affirmed.

/s/
HAROLD L. SATZ, JUDGE

Smith, P.J., and Stephan, J., concur.

Supreme Court, U.S.
FILED
JAN 10 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-859

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

STEVEN MEDVIK,
Petitioner,

vs.

FRANK OLLENDORFF, *et al.*,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE MISSOURI COURT OF APPEALS EASTERN DISTRICT

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TABLE OF CONTENTS

	Page
Statement of the Case	1
Reasons Why The Writ Should Be Denied	4
I. The First Amendment Does Not Protect A Public Employee's Private Racial Slurs	4
II. As Construed By The Missouri Courts, Rule 20 Is A Narrow And Specific Limitation Upon Conduct Not Protected By The First Amendment	5
III. Rule 20 Is Not Void For Vagueness	7
Conclusion	8
Appendix A: City Manager's Findings of Fact and Conclusions	A-1
Appendix B: Addition to Employees Handbook, City of University City, Missouri	B-1

TABLE OF AUTHORITIES

	Page
Chaplinsky v. New Hampshire, 315 U.S. 568 (1942)	6
Connick v. Myers, 461 U.S. 138 (1983)	4,5
Law Students Civil Rights Research Council v. Wadmond, 401 U.S. 154 (1971).....	6
Maynard v. Cartwright, 486 U.S. 356, 100 L. Ed. 2d 372 (1980)	7
Patterson v. McLean Credit Union, ____ U.S. ___, 109 S.Ct. 2363, 105 L. Ed. 2d 132 (1989)	5
Pickering v. Board of Education, 391 U.S. 563 (1968) ..	5
Rankin v. McPherson, 483 U.S. 378, *reh. denied*, 483 U.S. 1056 (1987)	4,5

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE MISSOURI COURT OF APPEALS EASTERN DISTRICT

Respondents Frank Ollendorff, the City of University City, and the Civil Service Board of University City respectfully request that this Court deny the petition for writ of certiorari seeking review of the Opinion of the Missouri Court of Appeals. That Opinion is reported at 772 S.W. 2d 696 (1989).

STATEMENT OF THE CASE

The City of University City discharged petitioner from his job as a mechanic, because petitioner repeatedly called a fellow employee a "nigger." This was the fourth occasion in five years on which petitioner had been disciplined — two of which involved racial slurs. Petitioner was involved in two additional incidents with racial overtones. Petitioner now claims that the discharge violated his rights under the First Amendment.

In May 1980, petitioner received a three day suspension for starting a fight with a fellow employee. App. A, p. A-2. The City also informed petitioner that his critical attitude toward other employees must improve. App. A, p. A-2.

In January 1981, petitioner referred to a black fellow employee as "that damned Frank Jones." App. A, p. A-3. Petitioner then exposed his buttocks to Mr. Jones and laughed. App. A, p. A-3. In February 1981, petitioner referred to Mr. Jones as a "fucking punk," and derided his ability to operate a City vehicle. App. A, p. A-3.

In February 1983, petitioner received a one day suspension for violation of work rules. The City informed him that his prior history was a matter of concern, and that his conduct was not acceptable for a person in a supervisory capacity. The City also told petitioner that further incidents would lead to discipline, including a possible discharge. App. A, p. A-3.

In June 1983, petitioner asked a black fellow employee if he had obtained his ignorance from his mother or father. The City demoted him from supervisor to mechanic, and told him that any further incident would jeopardize his employment status. App. A, p. A-2.

In March 1985, petitioner told his supervisor that Thirplis Williams, a fellow employee, was a "hero nigger," who was misusing the shop. App. A, p. A-2. Petitioner told the supervisor repeatedly that "A nigger was a nigger." App. A, p. A-2. Petitioner told Mr. Williams that "You don't have anything to say to me ever again nigger." App. A, p. A-2.

Rule 20 of the City's work rules permits discipline for:

> An incident involving an unwanted or imprudent statement or action to a co-worker of a sexual, racial, ethnic or religious nature."

App. B, p. B-5. The court below held that, sensibly construed, Rule 20 was intended to "prohibit well known pejoratives unacceptable in the work place." 772 S.W. 2d at 701.

Respondent Frank Ollendorff, the City Manager, reviewed the complete factual record. App. A, p. A-1. Based on that history, he concluded that petitioner's:

> long-term conduct has been inconsistent with a business-like work environment. His background of disciplinary actions, warnings, suspensions and threats of discharge reinforce the conclusion that he has been a troublesome employee over the long term whose retention in the work force will continue to be disruptive to discipline and morale.

App. A, p. A-4.

Petitioner does not challenge the factual basis for his dismissal. Instead, he claims that Rule 20 violates his alleged rights under the First Amendment to engage in racial harassment of fellow employees.

REASONS WHY THE WRIT SHOULD BE DENIED

I. THE FIRST AMENDMENT DOES NOT PROTECT A PUBLIC EMPLOYEE'S PRIVATE RACIAL SLURS.

This Petition asserts that the First Amendment protects a public employee's "right" to call a fellow employee a nigger. The premise is that the First Amendment applies to public employee discipline in the same way that it applies to criminal statutes enacted pursuant to a state's police power. The premise is false.

In *Connick v. Myers*, 461 U.S. 138 (1983), this Court so held. When acting as an employer, a public entity may regulate the private speech of its employees to assure the efficient conduct of its operations:

> [I]f Myers' questionnaire cannot be fairly characterized as constituting speech on a matter of public concern, it is unnecessary for us to scrutinize the reasons for her discharge. When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment.
>
> . . . .
>
> [W]hen a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.

461 U.S. at 146-47. Accord, *Rankin v. McPherson*, 483 U.S. 378, 384 *reh. denied*, 483 U.S. 1056 (1987) (public entity may

discipline employees for speech that interferes with efficient operations).

There is no rational argument — and petitioner certainly makes none — that his remarks dealt with matters of public concern. There is no social utility in repeatedly calling a black man a "nigger." On the contrary, as the Court below found, it is hard to imagine an insult more likely to disrupt the work place. 772 S.W. 2d at 702. Indeed, the City might have exposed itself to serious legal liability had it *not* prohibited this type of "free speech." *Patterson v. McLean Credit Union*, ____ U.S. ____, 109 S.Ct. 2363, 105 L. Ed. 2d 132, 152-53 (1989).

The court below understood and followed this Court's precedents. The court below recognized the difference between criminal statutes and administrative rules governing public employees. 772 S.W. 2d at 702, *quoting Rankin*. It clearly understood the distinction between matters of public and private concern. *Id., citing Connick*. And it expressly found that the City's interest in efficient operations outweighed whatever rights petitioner may have had. *Id., citing Pickering v. Board of Education*, 391 U.S. 563 (1968). Petitioner's claim that this carefully reasoned decision ignored this Court's First Amendment jurisprudence is simply wrong.

The First Amendment does not protect the type of conduct in which Petitioner engaged. He has no right to vent his racial animus upon a fellow employee.

II. AS CONSTRUED BY THE MISSOURI COURTS, RULE 20 IS A NARROW AND SPECIFIC LIMITATION UPON CONDUCT NOT PROTECTED BY THE FIRST AMENDMENT.

Even if the First Amendment protected petitioner's wholly private remarks, Rule 20 passes constitutional muster. The court below interpreted Rule 20 to mean something quite different than petitioner's fevered speculation. So construed, Rule

20 easily satisfies the "fighting words" test set forth in *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

The court below directly addressed petitioner's argument that Rule 20 was facially unconstitutional. It rejected that argument, because the Rule was susceptible to a "sensible construction" that did not violate the First Amendment. 772 S.W. 2d at 701-02. Petitioner now claims that the court below violated *Missouri* law in so construing the Rule. Pet. at 14-16. Of course, state court interpretations of state law are binding upon this Court. *Law Students Civil Rights Research Council v. Wadmond*, 401 U.S. 154, 162-63 (1971).

As construed by Missouri courts, therefore, Rule 20 prohibits "well known pejoratives unacceptable in the workplace." Under *Chaplinsky*, that Rule complies with the First Amendment. In *Chaplinsky*, the statute prohibited "offensive" words. The state court construed that term to mean words that:

> men of common intelligence would understand would be words likely to cause an average addressee to fight.

315 U.S. at 573. This Court held that such a statute was "narrowly drawn" — limited to "specific conduct" that was likely to cause a breach of the peace. *Id.* at 573-74.

The same rule applies here. As the court below noted:

> A rule designed to prevent inflammatory and disruptive statements, however, necessarily involves some inherent uncertainty. Other than a litany of selected terms, an alternative definition that provides a bright line between permissible and impermissible speech in the work place is not readily apparent. . . . At this stage of civilized history, persons of normal intelligence are capable of determining whether a racial remark is "unwarranted" or "imprudent."

772 S.W. 2d at 701.

Mr. Chaplinsky could determine that describing people as a "god damned racketeer" and a "damned Fascist" was likely to provoke a breach of the peace. Especially in light of repeated prior warnings, petitioner could deduce that calling a fellow employee a nigger is conduct "unacceptable in the work place."

As construed by the court below, Rule 20 satisfies any First Amendment concerns that may apply.

III. RULE 20 IS NOT VOID FOR VAGUENESS.

Petitioner also asserts that Rule 20 is void for vagueness, on the theory that a mechanic with an eighth grade education could not know that such remarks were prohibited. Pet. at 18-19. This contention is frivolous.

Petitioner acknowledges that the City could prohibit his racial slurs without violating the First Amendment. Pet. at 13. Moreover, petitioner had clearly been told that further racial harassment would lead to discipline, including discharge. App. A, p. A-2. Thus, petitioner had ample notice that such misconduct could forfeit his job. Outside the context of the First Amendment, a vagueness objection "may be overcome in any specific case where reasonable persons would know that their conduct is at risk." *Maynard v. Cartwright*, 486 U.S. 356, 100 L. Ed. 2d 372, 380 (1988).

To the extent that petitioner's vagueness argument relies on the First Amendment, of course, Points I and II of this Reply adequately address the issue.

CONCLUSION

For the foregoing reasons, Respondents respectfully pray that this Court deny the petition.

Respectfully submitted,

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APPENDIX

APPENDIX A

CITY OF UNIVERSITY CITY

In the Matter of:
Appeal of Stephen Medvik

CITY MANAGER'S FINDINGS OF FACT AND CONCLUSIONS OF LAW

I have read the transcript of the proceedings before the Civil Service Board of University City on the appeal of Stephen Medvik from his discharge from City employment as a mechanic, as well as the exhibits which were introduced at the hearing. I have also reviewed the findings and recommendation of the Civil Service Board.

After this case was remanded by the Court, I sent a letter to Mr. Medvik and his attorney, Alan G. Kimbrell, affording them the opportunity to present oral argument or a written brief to me. A copy of this letter is attached. In response, Mr. Kimbrell submitted the written brief which had been filed in the Court of Appeals on behalf of Mr. Medvik. Mr. Kimbrell further stated that Mr. Medvik waived the right to present oral argument. A copy of Mr. Kimbrell's response is attached. I have read Mr. Kimbrell's brief.

Taking into consideration the matter presented at the hearing, including both the testimony and the documents, the findings and recommendation of the Civil Service Board, and the appellate brief submitted on behalf of Mr. Medvik, I sustain his discharge, and make the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. On March 15, 1985, Medvik's fellow employee, Thirplis Williams, approached Medvik about a matter Williams had

reported to his supervisor concerning Medvik and a statement made by Medvik about Williams. Medvik told the supervisor, "Your hero nigger is misusing the shop." When Williams sought to talk to Medvik, Medvik replied, "You don't have anything to say to me ever again nigger." On the day before, Medvik had told the supervisor repeatedly that "A nigger was a nigger."

2. On June 17, 1983, Medvik was demoted from the position of Supervising Mechanic to Mechanic, with a one-step decrease in pay and a change in shift because he had made the following remark to a black employee — "Where did you get your ignorance from — your mother or your father?" Medvik was informed in writing that the remarks were completely out of line and particularly out of character for a supervisor. He was also notified that if any further incidents occurred, his employment status would be reviewed and discharge may result.

3. On February 28, 1983, Medvik was given a one-day suspension for violations of procedures and work rules on February 9, 1983. He was admonished that he had been involved in several incidents for which he had received either warning letters or suspensions, and that the frequency of such events was a matter of concern; that they were not in character with the conduct expected not only of a City employee, but, more significantly, that which is demanded of a supervisor. He was informed that should any more incidents occur, his supervisory status would be reviewed and demotion and/or suspension would be forthcoming, if not discharge.

4. On May 2, 1980, Medvik was suspended for three working days without pay. This action was taken because of Medvik's having started a fight with another employee, resulting in the breaking of the other employee's glasses. Medvik was told that his critical attitude toward other employees must improve immediately.

5. On February 10, 1981, a black employee, Frank Jones, had been asked to drive a payloader during the night. When

Medvik was informed that Jones was going to drive the vehicle, he said, "You mean to tell me Frank is going to drive that?" When Jones stated that he was qualified to drive it, Medvik responded: "Don't say a f-----g thing to me, Frank." After Jones asked what he meant, Medvik called Jones all kinds of f-----g punks, using all sorts of obscenities.

6. On January 27, 1981, Medvik stated, upon seeing Willie Jones, a black employee, entering the garage, "Here comes that damned Frank Jones." Medvik dropped his pants on the garage floor, then bent over and parted his buttocks, exposing himself to Jones. Then Medvik arose and pulled his pants back up and made a big laugh out of it.

7. Medvik was discharged by his department head, Willie Norfleet, Director of Finance, as of the end of the work day on March 22, 1985.

CONCLUSIONS OF LAW

1. By administrative regulation promulgated several years ago, the City compiled existing practices relating to discipline of City employees for violation of work rules. Violations were categorized into several groups and uniform disciplinary penalties were recommended. These were incorporated into the Employees Handbook.

2. Application of the suggested disciplinary penalties to Mr. Medvik's case warrants his discharge. For a fourth offense under Group I, the discipline is discharge. Medvik's record establishes at least four offenses under Group I. The racial slur made by him on March 15, 1985, concerning Thirplis Williams, was an incident involving an imprudent statement to a co-worker of a racial nature and fell within Group I, Item 20. Prior to this offense, the record established that Medvik had been disciplined for earlier Group I offenses — demotion, decrease in pay and shift change on June 17, 1983 for making an imprudent statement to a black employee; a one-day suspension for viola-

tion of several procedures and work rules on February 9, 1983; a three-day suspension for starting a fight with a fellow employee on April 14, 1980. Although unnecessary to my determination, the incidents of February 10, 1981 and January 27, 1981 also constitute improper conduct with racial overtones.

3. By its terms, the addition to the Employees Handbook setting out the recommended uniform disciplinary penalties is intended to serve as a guide to department heads for disciplining employees. It explicitly provides that its rules and regulations are not to be construed as a limitation upon the retained rights of the City, which include the discretion not only to suspend the operation of disciplinary action, but also to issue a more severe penalty than set out in the standard procedure, if it is felt necessary. The announced rules and regulations are working tools to be applied with sound discretion in the interest of discipline and morale in the work place.

4. An evaluation of Mr. Medvik's employment record compels the conclusion that his long-term conduct has been inconsistent with a business-like work environment. His background of disciplinary actions, warnings, suspensions and threats of discharge reinforce the conclusion that he has been a troublesome employee over the long term whose retention in the work force will continue to be disruptive to discipline and morale.

5. The action of the Director of Finance is sustained and Mr. Medvik is discharged, effective March 22, 1985.

/s/ Frank Ollendorff,
City Manager

Dated: August 27, 1987

APPENDIX B

Addition to

EMPLOYEES HANDBOOK

City of University City, Missouri

As a new City employee, you should be familiar with the following Administrative Regulation, which became effective March 16, 1981. The formulation of this regulation is for the benefit of the employee so that uniformity and fairness could be achieved and this was done through a compilation of many existing practices.

Uniform Disciplinary Penalties Recommended to City Departments for the Enforcement of General Work Rules

The following is intended to serve as a guide to department heads for providing some uniform procedures and penalties for disciplining or terminating **Regular Full-time Employees** for certain violations of general work rules. Seasonal, temporary, or probationary employees may be disciplined or terminated without recourse to such disciplinary procedures.

This regulation is not intended to contradict any provision contained in the other Specific Department Work Rule or Rules or the Police or Fire Manuals which may be more restrictive due to the unique character of that departmental operation and the expectations of employees within that department. Department heads must also follow the procedures contained in the Civil Service Rules governing Penalties and Separations for the executions required in the enforcement of such penalties.

WORK RULES

All employees of the City of University City are considered members of a team working together for the main purpose of serving our community. Employees who fail to follow the necessary rules and regulations governing their conduct not only hurt themselves, but reflect an undesirable image on the other City employees. In such cases, the supervisor is expected to take action to insure that the efforts of the majority of the employees are not jeopardized. This is done by applying the City's Rules and Regulations for employees.

In recognition of the fact that each instance differs in many respects from somewhat similar situations, the City retains the right to treat each occurrence upon its individual merits and without creating precedents for the treatment of any other case which may arise in the future. The City retains the right to suspend the operation of any disciplinary action which it may take, during good behavior for a specified term, at its exclusive discretion. Examples given in any rule do not limit the generality of the rule. Also, several infractions are of a related type offense dealing with poor work habits or disregard for established work schedules. In these cases of combined related infractions, consideration may also be given to deviation from the prescribed penalty. These rules and regulations are not to be construed as a limitation upon the retained rights of the City, but are merely a guide.

This Section of the rules and regulations applies for specific offenses. This means that a more severe penalty may be issued than that prescribed in the standard procedure, if it is felt necessary.

GROUP 1

First Offense Warning followed by appropriate instruction
Second Offense . . . One or two-day suspension without pay
Third Offense . . . . . Five-day suspension, without pay
Fourth Offense . . . . . Discharge

NOTE: Consideration may be given to the severity of the offense, the cost involved, the time interval between offenses, the length and quality of service record, and the ability of the employee concerned. In each case where the penalty deviates from the recommended standard penalties, the reasons for such deviation will be noted.

1. Absence from duty, without prior permission from the supervisor, except for cause beyond the control of the employee which prevents obtaining prior approval. When advance notice cannot be given, employees are expected to notify their supervisor, or if this is not possible, the supervisor designee (prior to shift start), of the reasons for their absence and the expected time of their return. Such notification does not mean that approval or permission has been granted for the absence. More restrictive time variables may be imposed by individual departmental regulations.

2. Leaving the assigned working area at any time without permission from the supervisor.

3. Neglect or carelessness in observance of official safety or departmental rules, or disregard of common safety practices.

4. Malicious mischief, horseplay, wrestling or similar undesirable conduct.

5. Disregarding job duties by neglect of work or reading for pleasure during working hours.

6. Tardiness.

7. Failure to commence work at the beginning of the duty period and leaving work prior to the end of the duty period. All employees are expected to work, excluding authorized breaks, from the beginning to the end of the duty period and neither arrive late nor leave early.

8. Creating or contributing to unsanitary or unsafe working conditions. Examples are: throwing refuse or objects on the floor or work area or placing or failing to remove hazardous objects from the assigned work area (These examples do not limit the generality of the rule).

9. Use or possession of another employee's working equipment without the supervisor's or employees's consent.

10. Willful failure, neglect or carelessness in punching as assigned time card in or out, if required, or failing to properly complete a required time of production report.

11. Stopping work or making preparations to leave work without specific authorization before the lunch period, or for any authorized break in work, or before the specified quitting time (two examples are: washing up or changing clothes before the specified quitting time).

12. Distracting the attention of others, or causing confusion by unnecessary shouting, catcalls, or demonstrations on the job.

13. Unsatisfactory work and/or failure to maintain required standards of performance.

14. Failure to report any personal injury or equipment damage immediately to the supervisor or failure to complete any required injury or damage forms.

15. Any type of solicitation without official permission during working hours.

16. Gambling, solicitation for bookmaking or similar offenses of a serious nature.

17. The use of any form of drug, including prescription medication, which may affect work, without prior notice to the supervisor.

18. Unauthorized posting of notices, or unauthorized removal of notices or signs from bulletin boards on City property.

19. Distributing or posting written or printed matter of any description on City premises unless authorized to do so by proper authority.

20. An incident involving an unwanted or imprudent statement or action to a co-worker of a sexual, racial, ethnic or religious nature.

GROUP II

First Offense . . . Two-day suspension without pay followed by appropriate instruction

Second Offense . . . . . Discharge

NOTE: Consideration may be given to the severity of the offense, the cost involved, the time interval between violations, the length and quality of service record, and the ability of the employee concerned. In each case where the penalty deviates from the recommended standard penalties, the reasons for such deviation will be noted.

1. Leaving the job during regular working hours without notice to and permission from the supervisor. Where the operations are continuous, an employee shall remain on the job through the end of the scheduled shift, until relieved by the supervisor or the relieving employee of the succeeding shift.

2. Sleeping during working hours.

3. Reporting for work or attempting to work while unfit for duty.

4. Possession of or drinking alcoholic beverages on the job.

5. The use of abusive or threatening language toward subordinates, fellow employees, members of the supervisory force, or the general public during working hours.

6. Failure to report for overtime work without good reason after being scheduled to work according to overtime policy, or refusal to accept emergency overtime work without sufficient reason.

7. Threatening, intimidating, coercing, or interfering with subordinates, fellow employees, or supervisors at any time.

8. Failure to report any accident, vehicular or otherwise, in which the employee was involved.

9. Refusing to give testimony when accidents, vehicular or otherwise, are being investigated by proper authority.

10. Unauthorized use of City property for private purposes or performing private work on City time.

11. The making or publishing of false, vicious or malicious statements concerning any employee, supervisor, city official, the City or its operations.

12. Conduct violating morality or common decency.

13. Sexual, racial, ethnic or religious harassment of a coworker.

14. Sexual, racial, ethnic or religious harassment of a member of the public whose contact with the employee is related to the employee's duties.

GROUP III

First Offense . . Five-day suspension without pay, followed by appropriate instruction

Second Offense . . . . . Discharge

NOTE: Consideration may be given to the severity of the offense, the cost involved, the time interval between violations, the length and quality of service record, and ability of the employee concerned. In each case where the penalty deviates from the recommended standard penalties, the reasons for such deviations will be noted.

1. Wanton or willful neglect in the performance of assigned duties or in the care, use or custody of any City property. Abuse or deliberate destruction in any manner of City property, tools, equipment, or the personal property of employees.

2. Punching another employee's time card, altering another employee's time card, or unauthorized altering of an assigned time card.

3. Insubordination by the refusal to perform work assigned or to comply with written or verbal instructions of the supervisor which the employee may reasonably be expected to perform.

4. Fighting with or attempting injury to another employee.

5. Falsifying testimony when accidents are being investigated or falsifying or assisting in falsifying personnel or other records, including production or work performance reports.

6. Making false claims or misrepresentations in an attempt to obtain unjustified leave benefits.

7. Misuse or removal of confidential City records or information of any nature, or revealing such information without proper written authority from the City.

8. Instigating, leading or participating in any walkout, strike, sitdown, stand-in, slow-down, refusal to return to work at the scheduled time for the scheduled shift, or other concerted curtailment or restriction of production or interference with work in or about the City.

9. Engaging in unlawful or improper conduct off the City premises or during non-working hours which affects or which tends to affect the employee's relationship to the job, fellow employees, supervisors of the City's property, reputation or good will in the community.

10. Representing or implying to a co-worker, subordinate, or member of the public, that the giving of a gift will result in preferential treatment.

11. Knowingly harboring a communicable disease such as, but not limited to, tuberculosis, which may endanger the health of other employees.

12. Stealing.

13. Using illegal drugs of any kind.

14. Dishonesty or any dishonest action.

15. Sexual, racial, ethnic or religious harassment of a subordinate.

GROUP IV

First Offense ..... Discharge

Employees may without prior warnings be subject to dismissal for serious infractions. Activities involving the items or areas listed below should be avoided. Each incident will be reviewed on a case by case basis.

1. Criminal activity.
2. Unauthorized use or display of firearms, explosives or other lethal weapons.
3. Accepting or soliciting a bribe of money, merchandise or personal services.
4. Fraudulent claim for on-the-job injury benefits or for Workers Compensation payments.
5. Removal from job if appointment has been made through fraud or error.
6. Taking part in the political campaign of any candidate for Councilmember or Mayor of the City of University City.
7. Making any contribution, direct or indirect, to any candidate for Councilmember or Mayor of the City of University City.
8. Serious infractions for miscounduct, inefficiency or other just causes not described in prior groupings.

/s/ Frank Ollendorff
City Manager